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Supreme Court, U.S.
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No. 06-590

IN THE

Supreme Court of the United States

BERNARD J. EBBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

REID H. WEINGARTEN
BRIAN M. HEBERLIG
KATHRYN J. GAINEY
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

MICHAEL A. VATIS
Counsel of Record
STEPTOE & JOHNSON LLP
750 Seventh Avenue, Suite 1900
New York, N.Y. 10019
(212) 506-3900

Counsel for Petitioner
Bernard J. Ebbers

TABLE OF CONTENTS

Page

Defense Witness Immunity 1

Standard of Review for Immunity Decisions 5

Conscious Avoidance 6

TABLE OF AUTHORITIES

Page

CASES

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) 5

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 6

Gov't of Virgin Islands v. Smith,
615 F.2d 964 (3d Cir. 1980) 1

Griffin v. United States,
502 U.S. 46 (1991) 9, 10

Kastigar v. United States,
406 U.S. 441 (1972) 3

Lebron v. Nat'l R.R. Passenger Corp.,
513 U.S. 374 (1995) 5

Napue v. Illinois,
360 U.S. 264 (1959) 4

Stevens v. Dep't of Treasury,
500 U.S. 1 (1991) 5

United States v. Aguilar,
80 F.3d 329 (9th Cir. 1996) 10

United States v. Alston-Graves,
435 F.3d 331 (D.C. Cir. 2006) 6, 7

TABLE OF AUTHORITIES—Continued

Page

United States v. Alvarez,
358 F.3d 1194 (9th Cir. 2004) 2

United States v. Bagley,
473 U.S. 667 (1985) 4

United States v. Barnhart,
979 F.2d 647 (8th Cir. 1992) 10

United States v. Baron,
94 F.3d 1312 (9th Cir. 1996) 10

United States v. Beckett,
724 F.2d 855 (9th Cir. 1984) 10

United States v. Bilis,
170 F.3d 88 (1st Cir. 1999) 8

United States v. Bordeaux,
436 F.3d 900 (8th Cir. 2006) 2

United States v. Croft,
124 F.3d 1109 (9th Cir. 1997) 3

United States v. de Francisco-Lopez,
939 F.2d 1405 (10th Cir. 1991) 10

United States v. Hilliard,
31 F.3d 1509 (10th Cir. 1994) 10

United States v. Hooks,
848 F.2d 785 (7th Cir. 1988) 2

TABLE OF AUTHORITIES—Continued

Page

United States v. Mapelli,
971 F.2d 284 (9th Cir. 1992) 8, 10

United States v. Moussaoui,
382 F.3d 453 (4th Cir. 2004) 1

United States v. Pac. Hide & Fur Depot, Inc.,
768 F.2d 1096 (9th Cir. 1985) 7, 10

United States v. Reyes,
362 F.3d 536 (8th Cir. 2004) 2, 4

United States v. Ruhe,
191 F.3d 376 (4th Cir. 1999) 7

United States v. Sanchez-Robles,
927 F.2d 1070 (9th Cir. 1991) 8, 10

United States v. Sicignano,
78 F.3d 69 (2d Cir. 1996) 10

United States v. Talley,
164 F.3d 989 (6th Cir. 1999) 2

United States v. Thevis,
665 F.2d 616 (5th Cir. 1982) 1

United States v. Westerdahl,
945 F.2d 1083 (9th Cir. 1991) 2

United States v. Young,
86 F.3d 944 (9th Cir. 1996) 2

TABLE OF AUTHORITIES—Continued

Page

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 5

Yates v. Evatt,
500 U.S. 391 (1991) 10

REPLY BRIEF FOR PETITIONER

The government acknowledges that the circuits are divided on the questions presented in this case but suggests that the differences are not important. The government's contentions are incorrect. The circuits are divided in significant and material ways.

1. *Defense Witness Immunity.* The government attempts to downplay the circuit split on defense witness immunity by stating that the courts differ only in their "articulations" of the standard. Opp. 13. It asserts that "all" the circuits "essentially require that the government abuse the power to grant immunity by 'intentionally attempting to distort the fact-finding process,'" and contends that only two types of "abuse" suffice: "(1) when the government has intimidated or harassed a potential defense witness and thereby encouraged the witness to invoke his Fifth Amendment privilege; and (2) when the government has deliberately withheld immunity from a prospective witness for the sole purpose of keeping evidence from a jury." Opp. 13-14.

In fact, the circuits have repeatedly referred to the divisions among them, indicating that they view the split as significant. *See, e.g., United States v. Moussaoui*, 382 F.3d 453, 467 (4th Cir. 2004) ("The circuits are divided with respect to the question of whether a district court can ever compel the government...to grant immunity to a potential defense witness."); *United States v. Thevis*, 665 F.2d 616, 639 (5th Cir. 1982) ("[T]he circuit courts...have produced widely divergent opinions."). Moreover, the Third Circuit has explicitly stated that immunity should be granted "even if there is no evidence of...prosecutorial misconduct, [but] when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case." *Gov't of Virgin Islands v. Smith*, 615 F.2d 964, 974 (3d Cir. 1980). In addition, the Ninth Circuit has explicitly held that "misconduct is not confined solely to

situations in which the government affirmatively induces a witness not to testify in favor of a defendant" or deliberately withholds immunity solely to keep evidence from the jury; rather, "misconduct" exists where the "government...grant[s] immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness whose testimony would directly contradict that of the government witness." *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991); *accord United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). The Ninth Circuit has reversed convictions on precisely this ground. *See Westerdahl*, 945 F.2d at 1087; *United States v. Young*, 86 F.3d 944, 949 (9th Cir. 1996).[1]

Other circuits also do not require evidence of deliberate prosecutorial "abuse," but will compel defense immunity where the government's immunity decisions, whatever the intent behind them, deprive the defendant of a fair trial. This can occur where the defense witness's testimony is "clearly exculpatory" (*United States v. Bordeaux*, 436 F.3d 900, 905 (8th Cir. 2006)); where the government introduces an out-of-court statement of a witness but then refuses to immunize him when the defense seeks his testimony to cross-examine him (*United States v. Reyes*, 362 F.3d 536, 542 n. 7 (8th Cir. 2004)); or where the government's selective immunity grants produce "egregiously lopsided access to evidence" (*United States v. Talley*, 164 F.3d 989, 997 (6th Cir. 1999); *United States v. Hooks*, 848 F.2d 785, 802-03 (7th Cir. 1988)).

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[1] Because the Ninth Circuit defines "misconduct" much more broadly than the government would have it, that court would at least have ordered an evidentiary hearing in this case. *See Westerdahl*, 945 F.2d at 1087 ("the [government's] use of this [immunized] testimony, while effectively denying Westerdahl the right to contradict it with Goldsberry's testimony, may have distorted the fact-finding process, and an evidentiary hearing should have been held.").

The government's contention that no other circuit would have compelled immunity in this case is also incorrect. The government claims that the Ninth Circuit would not grant immunity to a defense witness who "is facing prosecution on the same or related charges." Opp. 16. But the case it cites, *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997), does not support its argument. In *Croft*, the government actually offered the proposed defense witnesses use immunity—"the same arrangement it had made with the prosecution witnesses." *Id.* at 1117. But the defense witnesses, who were overseas and outside the government's reach, insisted on something more—*transactional* immunity—before they would return and testify. Moreover, both witnesses had already been *indicted.* In those circumstances, the court "decline[d] to adopt a rule that would require the government to grant transactional immunity to an indicted co-conspirator," since "[t]he transactional immunity they sought would clearly affect the charges against them." *Id.*

This case is utterly different. Ebbers did not seek transactional immunity for his witnesses, but only the same use immunity given to the prosecution witnesses, which would not have prevented the government from prosecuting the defense witnesses if it actually wanted to. *See Kastigar v. United States*, 406 U.S. 441, 453 (1972). Moreover, Ebbers' proposed witnesses had not been—and never have been—indicted, undermining the government's claim of significant prosecutorial interest in them.[2]

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[2] During oral argument before the Second Circuit, the government conceded that there were "no active steps being taken" to investigate the witnesses. When the court asked when the investigation went inactive, the government did not respond. When the court asked whether there had been any activity since Ebbers' trial, the record reflects a "long pause" before the government said, "I don't think anything specific has been done." *United States v. Ebbers*, No. 05-4059-cr (2d Cir. Jan. 30, 2006).

The government offers no explanation for its assertion that the Sixth and Seventh Circuits would not have compelled immunity in this case other than to say that those circuits' descriptions of the "egregious imbalance" standard are dicta. Opp. 17. But the fact that those circuits did not compel immunity in those cases does not alter the fact that they have expressly adopted a standard markedly different from the Second Circuit's. Nor does it disprove that the government's immunity decisions in this case created an egregious imbalance in access to evidence—the government granted immunity to eight prosecution witnesses while denying it to all three proposed defense witnesses who would have directly contradicted the prosecution's immunized witnesses and undermined their credibility.

The government is also wrong in asserting that the Third and Eighth Circuits would not have granted immunity here because Ebbers' witnesses "would not have exculpated him and w[ere] not essential to his defense." Opp. 16. The Second Circuit below acknowledged (Pet. App. 20a-23a) that the defense witnesses would have contradicted the government's immunized witnesses and their own purported out-of-court statements—including statements that the government held up to the jury as among the "Top Ten" most incriminating items of evidence. It defies logic, then, to describe the proffered testimony as not exculpatory or not necessary to an effective defense. *Cf. United States v. Bagley*, 473 U.S. 667, 676 (1985) ("[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence" for *Brady* purposes); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."). Indeed, the Eighth Circuit has stated that use immunity should be granted in precisely this situation. *Reyes*, 362 F.3d at 542 n.7.

2. *Standard of Review for Immunity Decisions.* Contrary to the government's suggestion, this case is an appropriate vehicle for resolving the circuit split concerning the standard of review for immunity decisions. Even if Ebbers did not press the issue below, the government raised it, and the Second Circuit addressed it. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law.") (internal citations and quotation marks omitted); *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991) (rejecting argument that petition should be dismissed because issue was not raised below, noting "[w]e rejected that argument in granting certiorari, and we reject it again now, because the Court of Appeals...decided the substantive issue presented"); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).[3]

As for the merits, the government concedes that defense witness immunity is a mixed question of law and fact, but contends that there is no "absolute rule" requiring that such questions be reviewed *de novo*. Opp. 20. Yet, the government cites no case in which this Court has held that mixed questions should be reviewed for abuse of discretion. The sole case it cites holds simply that "courts of appeals should apply ordinary, not special, standards when reviewing

[3] The government's assertion (Opp. 19) that the Second Circuit's decision on the standard of review is subject to "plain error" review by this Court is nonsensical, and completely unsupported by any of this Court's precedents. The circuit cases the government cites are inapposite, as they deal with plain error review by courts of appeals of issues that were not preserved at trial. The issue of the standard of appellate review, of course, could not have been raised at trial.

district court decisions upholding arbitration awards." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Moreover, this Court's precedents make clear that the ordinary standard for reviewing mixed questions of law and fact is *de novo* review.

3. *Conscious Avoidance.* In response to Ebbers' argument that a conscious avoidance instruction should never be given where the statute requires "actual knowledge," the government claims that "it is well settled...that willful blindness or conscious avoidance is the legal equivalent to knowledge." Opp. 20. But the cases the government cites actually show that the courts differ widely in how they view conscious avoidance. Some courts say conscious avoidance is the "legal equivalent to knowledge." Other courts say conscious avoidance and actual knowledge are "equally culpable," even if they are not the same thing. And still others say conscious avoidance is not the same as actual knowledge, but that it can be used to infer knowledge. The differences are not merely semantic. To say that a defendant's actions to avoid confirming a fact can support an inference of actual knowledge of that fact is one thing; it at least leaves the *mens rea* as Congress defined it, and leaves it to a jury to determine whether that element was proven. But to say that conscious avoidance is the "equivalent" of knowledge (as the instruction did in this case) or that it can be punished under a statute requiring actual knowledge because it is "equally culpable" allows courts to rewrite statutes and reduce the *mens rea* requirement.

Although no court has completely barred conscious avoidance instructions, many courts have expressed serious misgivings about them. In *United States v. Alston-Graves*, 435 F.3d 331 (D.C. Cir. 2006), for instance, the D.C. Circuit engaged in an extended critical discussion of the conflicting rationales that have been given for the instruction, and concluded that the instruction is, at least, "problematic" (*id.*

at 337) because it permits a jury to "convict a defendant for acting recklessly...or even for acting negligently" (*id.* at 340). The court did not need to decide whether the instruction is never appropriate, however, because the necessary factual predicate for giving the instruction had not been met anyway. *Id.* at 341. *Alston-Graves* crystallizes the discomfort most circuits, with the notable exception of the Second Circuit, have expressed with the instruction.

As for the standard for determining when the instruction may be given, the government concedes that the circuits are divided, but says that "it is not clear that the difference in the standards affects the outcomes of cases." Opp. 22. In fact, the different standards have clearly affected the outcomes of cases. *Compare, e.g., United States v. Pac. Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098-99 (9th Cir. 1985) (Kennedy, J.) (reversing conviction because "[t]here was no evidence that defendants deliberately avoided learning the true nature of [a suspicious fact] *so as to build a defense in the event of arrest*") (emphasis added), *with United States v. Ruhe*, 191 F.3d 376, 385 (4th Cir. 1999) (rejecting "Ninth Circuit's additional requirement that the government prove that the defendant's ignorance was for the purpose of providing a defense in case of prosecution," and upholding use of instruction despite lack of evidence that defendant avoided knowledge for purpose of building a defense).

In this case, there was no evidence—and the government never argued—that Ebbers consciously avoided knowledge of fraud for the purpose of building a legal defense. Even if one believed that Ebbers' failure to read the entirety of voluminous financial reports or to notice discrepancies in line costs was suspicious,[4] his omissions do not indicate that he

[4] In fact, the reason Ebbers ignored the MBVR report from 2001 is that the first few reports did not contain the finalized 2001 budget numbers. Tr. 4063. For those reports Ebbers did read parts of, he

(Continued ...)

was avoiding knowledge to build a defense. Instructing the jury on conscious avoidance therefore would have been deemed error in the First, Eighth, Ninth, Tenth, and Eleventh Circuits. *See, e.g., United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992) (reversing tax evasion conviction of owner and executive of company because her suspicious conduct, while possibly showing that she was "knowingly skimming" funds, did not show conscious avoidance).

In addition, the government's contention (Opp. 26) that only the Tenth Circuit has held that the prosecution cannot rely on the same evidence to show both actual knowledge and conscious avoidance is explicitly contradicted by decisions of the First and Ninth Circuits. *See, e.g., United States v. Bilis*, 170 F.3d 88, 93 (1st Cir. 1999) (conscious avoidance instruction appropriate only "'[a]s long as separate and distinct evidence supports a defendant's deliberate avoidance of knowledge and the possibility exists that the jury does not credit the evidence of direct knowledge'") (citation omitted); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1074 (9th Cir. 1991) (conscious avoidance instruction appropriate if "[t]he facts and circumstances creating that high probability [of illegality]...did not at the same time give those defendants any *direct* knowledge of illegality"). It is also inconsistent with the government's own argument below. Gov't Br. at 81 n.* ("Ninth Circuit Law, as expressed in *Mapelli*, is plainly inconsistent with Second Circuit law.").

Finally, the government contends that error in giving the instruction was harmless because the evidence of actual knowledge was "overwhelming." Opp. 27. But the

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testified that "the focus of my attention in this report was on the SG&A section and not on these preliminary pages" where line-cost variances were shown. Tr. 4049. Sullivan confirmed that the primary purpose of the MBVR had nothing to do with line costs. Tr. 1865.

government's argument at trial undercuts its new-found assurance. The reason it pressed for the instruction was its understandable concern that the jury would not believe Scott Sullivan, the chief witness supporting its assertion that Ebbers had actual knowledge of the fraud perpetrated by Sullivan's accounting department. *See, e.g.*, J.A. 364 ("If they believe Mr. Sullivan, we don't need any of this [instruction]. It's appropriate here because they could not believe Mr. Sullivan...."). Sullivan had been convicted of conspiracy and securities fraud and had entered a cooperation agreement with the government in order to obtain a reduced sentence. His credibility was therefore dubious. And even viewed in the light most favorable to the government, the evidence showed only that when Sullivan informed Ebbers of the need to reduce earnings estimates, Ebbers simply refused (Pet. App. 6a) or said, obscurely, "[W]e have to hit our numbers" (Pet. App. 5a); and when Sullivan told Ebbers of his plan to allocate current expenses to capital expenses, "Ebbers did not deter him from the allocation" (Pet. App. 8a) and later told him "[w]e have to grow our revenue and we have to cut our expenses, but we have to hit the numbers this quarter" (*id.*). The evidence of actual knowledge was thus marginal at best. It is no surprise, then, that the Second Circuit did not affirm on the ground of harmless error.

The government's reliance on *Griffin v. United States*, 502 U.S. 46 (1991), is also misplaced. *Griffin* held that a general guilty verdict on a multiple-object conspiracy charge need not be set aside if the evidence is inadequate to support conviction as to one of the objects but is adequate as to the other. But Ebbers is not arguing merely that that there was insufficient evidence of conscious avoidance to support conviction. He is arguing that giving the conscious avoidance instruction was legal error because it permitted the jury to convict without having to find the *mens rea* required

by statute. This Court in *Griffin* specifically stated that this sort of error is not harmless:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question...fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

502 U.S. at 59; *accord Yates v. United States*, 354 U.S. 298, 312 (1957) ("the proper rule to be applied is that which requires a verdict to be set aside in cases where a verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"). For this reason, courts have repeatedly rejected the government's argument that giving a conscious avoidance instruction was harmless error, even after *Griffin*. *See, e.g., United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States v. Aguilar*, 80 F.3d 329, 333-334 (9th Cir. 1996); *United States v. Sicignano*, 78 F.3d 69, 73 (2d Cir. 1996); *United States v. Hilliard*, 31 F.3d 1509, 1516-1517 (10th Cir. 1994); *United States v. Barnhart*, 979 F.2d 647, 653 (8th Cir. 1992); *Mapelli*, 971 F.2d at 287. *See also Pac. Hide & Fur Depot*, 768 F.2d at 1099; *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1413 (10th Cir. 1991); *Sanchez-Robles*, 927 F.2d at 1075.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Vatis

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